United States Court of Appeals

for the Second Circuit

APPELLANT'S SUPPLEMENTAL BRIEF

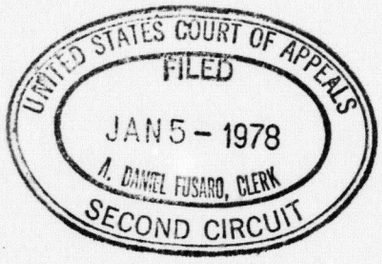
76-7414

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRUNSWICK CORPORATION and
SHERWOOD MEDICAL INDUSTRIES, INC.
Counterdefendants-Appellees,

v.

DAVID S. SHERIDAN and
NATIONAL CATHETER CORPORATION,
Counterclaimants-Appellants.



B P/S

On Appeal From The United States
District Court For the Northern
District of New York

APPELLANTS' SUPPLEMENTAL BRIEF ON JURISDICTION
IN RESPONSE TO THE COURT'S REQUEST

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRUNSWICK CORPORATION & SHERWOOD MEDICAL INDUSTRIES, INC.,	)	
Plaintiffs and Counter-defendants-Appellees,	)	
v.	)	Docket No. 76-7414
DAVID S. SHERIDAN and NATIONAL CATHETER CORPORATION,	)	
Defendants and Counter-claimants-Appellants.	)	

APPELLANTS' SUPPLEMENTAL BRIEF ON JURISDICTION
IN RESPONSE TO THE COURT'S REQUEST

Introduction

This supplemental brief is submitted in response to this Court's oral request that an additional brief be submitted on the issue of:

> Whether or not this Court has jurisdiction over the appeal of the antitrust counter-claims in light of defendants' suggested construction of the 1971 agreement.

For the following reasons, the court does have jurisdiction over this appeal: first, the appeal is properly before the court at this time and defendants' interpretation of the 1971 agreement raises no jurisdictional issue;

second, any finding on the interpretation of the 1971 agreement would have little bearing on this appeal since the elements of an antitrust claim would be present regardless of the interpretation placed on the agreement; and, third, the dismissal of this appeal would be inappropriate because it would greatly complicate any subsequent appeal, would result in a substantial hardship to the parties and would deprive the lower court of essential guidance on the antitrust issues.

I. THIS APPEAL IS PROPERLY BEFORE THE COURT AND THE DEFENDANTS' INTERPRETATION OF THE 1971 AGREEMENT RAISES NO JURISDICTIONAL ISSUE.

This appeal is properly before the court because the lower court has entered a final judgment on defendants' antitrust counterclaims under Rule 54(b) and because the appeal has been properly perfected. In addition, a motions panel of this Court denied a motion to dismiss filed by the plaintiffs shortly after the appeal was docketed, and, in doing so, one member of the panel (Judge Timbers) stated that an immediate appeal in this case made "eminent good sense."

As to the 1971 agreement, the defendants' interpretation of that agreement has no relevance to this Court's

jurisdiction over the appeal for the following reasons. First, the decision under review was not based on the defendants' interpretation of the agreement because the lower court did not accept either side's interpretation in granting a directed verdict on the antitrust counterclaims.*/ Indeed, the court found that the proper interpretation of the agreement was an unresolved factual issue since it sent precisely that issue to the jury in the context of plaintiffs' breach of contract claim.**/ Thus, the validity of the lower court's action could not depend upon defendants' interpretation since that interpretation was the subject of a factual dispute and since a dispute as to any fact material to the decision would have precluded a directed verdict.

Second, the interpretation of the agreement would not affect the Court's jurisdiction over this appeal because there are at least three grounds for finding a "contract" or

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*/ As pointed out in appellants' reply brief (p. 5 n.4), the lower court's decision appears to have been based, at least in part, on a misreading of Bradford v. New York Times Co., 501 F.2d 51 (2d Cir. 1974). See discussion at 8 herein.

**/ Moreover, if the court had accepted defendants' interpretation of the agreement, it would have been required to direct a verdict against the plaintiffs on the breach of contract claim, which it did not do.

"combination" under section 1 of the Sherman Act regardless of how the agreement is interpreted. Those grounds are discussed below. In addition, the interpretation of the agreement would have no significant effect on defendants' section 2 Sherman Act claim since section 2 does not require that any contract or combination be shown.

In summary, the decision under review was not based on defendants' interpretation of the 1971 agreement, and, in any event, defendants' interpretation raises no jurisdictional issue.

II. ANY SUBSEQUENT FINDING ON THE INTERPRETATION OF THE 1971 AGREEMENT WOULD HAVE NO BEARING ON THIS APPEAL SINCE THE ELEMENTS OF AN ANTITRUST CLAIM ARE PRESENT REGARDLESS OF THE INTERPRETATION ADOPTED.

No matter how the 1971 agreement is ultimately interpreted in plaintiffs' contract action, the elements of an antitrust violation are present in this case for four reasons.

First, even if defendants' interpretation is eventually accepted, the agreement nonetheless did restrain trade. Plaintiffs have asserted that since the defendants did not refrain from dealing in conductive line tubing the 1971 agreement did not restrain trade. (Appellees' Brief 16-18.) But even if the defendants dealt in conductive line tubing,

the agreement plainly did constitute a contract in restraint of trade since Sherwood used the agreement to prevent American Hospital Supply Corporation ("AHSC") from purchasing the defendants' conductive line tubing. (Appellants' Brief 9-10.) Thus, although the agreement may not have prevented the defendants from manufacturing the tubing, it did constitute a restraint because it prevented third parties from purchasing the tubing. In any event, defendants' refusal to adhere to plaintiffs' interpretation of the agreement would certainly not preclude defendants from maintaining a section 1 claim based on the agreement for any damage suffered as a result of plaintiffs reliance on the agreement. See, e.g., Sahm v. V-1 Oil Co., 402 F.2d 69 (10th Cir. 1968).

The second ground for finding the requisite contract or combination consists of the combined efforts of Brunswick and Sherwood to enforce their over-broad interpretation of the agreement by threatening defendants' customers with litigation if they purchased the tubing and by joining in the present litigation. (Appellants' Reply Brief 12-13.) As a result of the plaintiffs' action, AHSC refrained from purchasing defendants' conductive line tubing which caused the defendants to suffer approximately $350,000 in damages over a nine-month period. Even if defendants' interpretation of the agreement is ultimately accepted, those damages have already been

suffered as a result of the actions of Brunswick and Sherwood whose joint efforts to enforce their interpretation of the agreement would constitute a combination in restraint of trade.

Third, at a minimum, the evidence shows a contract or combination between Sherwood on the one hand and AHSC on the other. Sherwood's former president testified that he called an AHSC executive to assert that the defendants were breaching the 1971 agreement and to warn that if AHSC purchased the defendants' tubing it might become "embroiled" in litigation. (J.A. 71-74.) As a result, AHSC did refrain from purchasing the defendants' tubing for a number of months. Thus, Sherwood sought to prevent AHSC from purchasing the defendants' tubing and AHSC acquiesced; the net result was a combination or concert of action in restraint of trade even though AHSC was an unwilling participant. United States v. Parke, Davis & Co., 362 U.S. 29 (1960); Osborn v. Sinclair Refining Co., 286 F.2d 832 (4th Cir. 1960), cert. denied, 366 U.S. 963 (1961).

Finally, even if there were no "contract" or "combination" in restraint of trade, that would be entirely irrelevant to defendants' claim under section 2 of the Sherman Act. Section 2, though it prohibits combinations or conspiracies to monopolize, also prohibits monopolizing or attempting to monopolize. The latter, of course, require no concert of action and a violation of section 2 may consist entirely of unilateral action.

For the reasons set forth above, the elements necessary to support defendants' antitrust counterclaims would exist regardless of the interpretation applied to the 1971 agreement.

III. DISMISSAL OF THE APPEAL WOULD BE INAPPROPRIATE BECAUSE IT WOULD GREATLY COMPLICATE ANY SUBSEQUENT APPEAL, WOULD RESULT IN A SUBSTANTIAL HARDSHIP TO THE PARTIES AND WOULD DEPRIVE THE LOWER COURT OF ESSENTIAL GUIDANCE ON THE ANTITRUST ISSUES.

In entering a final judgment on the directed verdicts under Rule 54(b), the lower court issued a six-page Memorandum Opinion, a copy of which is attached hereto, describing in detail its reasons for concluding that an immediate appeal was appropriate. Those reasons included a significant reduction in the complexity of the issues, the unlikelihood that an appeal would be mooted by the developments during any retrial, the "probability" that a third trial would be required if an immediate appeal was not permitted, the substantial hardship to the parties and the misuse of judicial resources which would result from an unnecessary repetition of the evidence, and the fact that the issues presented were primarily questions of law. (See Memorandum Opinion 3-5.)

The lower court's Opinion also shows that the court needed, and was earnestly requesting, guidance on the proper application of the antitrust laws to the issues in this case. The court

specifically requested guidance on whether this case was controlled by Bradford v. New York Times Co., 501 F.2d 51 (2d Cir. 1974) or by Compton v. Metal Products, Inc., 453 F.2d 38 (4th Cir. 1971), cert. denied, 406 U.S. 968 (1972) and whether the Bradford decision prevented the finding of a section 1 violation in this action. (Memorandum Opinion 5.) This Court's subsequent decision in Newburger, Loeb & Co. v. Gross, 1977-2 Trade ¶ 61,604 (1977), shows that a section 1 violation could be found in this action. Moreover, for the reasons stated in appellants' brief (28-29), the Bradford decision would not even apply, and, in fact, the plaintiffs have not argued that it does despite heavy reliance on that decision in the court below. (Appellants' Reply Brief, 5 n. 4.)

Hence, as subsequent developments have shown, there is a substantial likelihood that the lower court misapplied Bradford in granting the directed verdicts. In this regard, it should be noted that the court also relied on Bradford in refusing to instruct the jury on the defendants' antitrust defense to the plaintiffs' breach of contract claim. Thus, the legal error which defendants contend has been committed will negate the effect of any retrial and, in the lower court's words, will "in all probability require a third trial." (Memorandum Opinion 4.)

The reasons outlined above were considered by the motions panel of this Court in denying the plaintiffs' motion to dismiss the appeal even before the briefs were filed and before Newburger was decided. The reasons for deciding the appeal are even stronger now since the appeal has been fully briefed and is now ripe for [illegible]sion. Defendants certainly do not contend that the Court is barred from reconsidering any issues relating to jurisdiction. Defendants respectfully submit, however, that the reasons supporting an immediate determination in this appeal far outweigh any other considerations which might exist.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Appellants' Supplemental Brief on Jurisdiction in Response to the Court's Request were ~~hand-delivered~~ mailed this 5th day of January 1978 to Watson B. Tucker, Esquire, Mayer, Brown & Platt, 231 South LaSalle Street, Chicago, Illinois 60604, counsel for appellees.

David J. Hensler

David J. Hensler

ATTACHMENT TO APPELLANTS' SUPPLEMENTAL BRIEF ON JURISDICTION IN RESPONSE TO THE COURT'S REQUEST

FILED
JUL 22 1975
AT ___ O'CLOCK ___ M.
J. R. SCULLY, CLERK
ALBANY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

BRUNSWICK CORPORATION and
SHERWOOD MEDICAL INDUSTRIES, INC.,

Plaintiffs,

72-CV-522

-against-

DAVID S. SHERIDAN and
NATIONAL CATHETER CORPORATION,

Defendants.

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JOHN P. ARNESS
DAVID J. HENSLER

JAMES T. FOLEY, D.J.

MEMORANDUM - DECISION

The trial of this action before a jury with me as Trial Judge commenced on March 29, 1976, in Albany, New York. The trial brought forth twelve days of testimony which was both technical and complex. The center of the controversy framed by the amended complaint was the breach of a settlement agreement entered into on May 28, 1971, which by its terms prevented defendant Sheridan as of February 1969 from the manufacture and sale of medical conductive line tubing similar to the products of plaintiffs. The relief prayed for was a permanent injunction and an accounting of profits. Four counterclaims in an Amended Answer and Amended Counterclaim (served on August 28, 1975) spun a web of many other issues, particularly those involving alleged antitrust violations, tortious interference with contract and business relationships and unfair competition. These issues produced and were highlighted at the trial with demonstrations of the function and use of medical tubing and related hospital

equipment with other testimony entering into the difficult field of patent applications, their issuance and validity. At the close of the evidence, a motion was made by plaintiffs for a directed verdict against counterclaims I, II, III and IV. It was my judgment after careful review and consideration, that no evidence was presented which supported the alleged deliberate attempt to restrain trade nor any persuasive evidence of conspiracy or combination in which plaintiffs were shown to have been participants, nor was unfair competition proven, and therefore a verdict was directed dismissing counterclaims I, III and IV. It was noted in my decision, delivered from the bench on April 19, 1976 (that shall be transcribed and filed with this Memorandum-Decision) that similar claims in the anti-trust allegations had been rejected by the Court of Appeals, Second Circuit, in Bradford v. New York Times Company, 501 F.2d Cir. 1974); see also Golden v. Kentile Floors, Inc., 512 F.2d 838, 843-46 (5th Cir. 1975).

The motion for a directed verdict against counterclaim II was denied because it was my judgment that there was sufficient evidence to have a jury decide whether there was any interference with contract, particularly because of significant aspects of the evidence that were pointed out in my jury instructions.

These remaining issues of the amended complaint and one counterclaim were submitted to the jury pursuant to Federal Rule of Civil Procedure 49(a). Six questions were framed after submission by the attorneys of proposed interrogatories and after consultation with them. After four days of daily deliberation, the jury reported an inability to reach unanimous agreement on answers to essential questions and at the urging of the attorneys, I discharged them and declared a mistrial.

Defendants request this Court by reference to court motion for certification with express direction that the three counterclaims

dismissed by the directed verdict in open court are final judgments and that "there is no just reason for delay", pursuant to Federal Rule of Civil Procedure 54(b) for appropriate appeal under 28 U.S.C. § 1291. Their purpose is clearly to undertake an immediate appeal on the three counterclaims dismissed at the end of the evidence.

In my judgment, there are sufficient grounds to certify these counterclaims for appeal at this time. In my remarks when I granted the dismissal, I implied an appeal in this regard would be in good order and lessen some of the complexity in an exceptionally complex case for a lay jury to listen to, understand and decide. The Court of Appeals, Third Circuit, has summarized the essential factors to be considered in such a certification:

> In reviewing 54(b) certifications, other courts have considered the following factors, inter alia: (1) the relationship between the adjudicated and unadjudicated claim; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in setoff against the judgment sought to be final; (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.
>
> Allis-Chalmers Corp. v. Philadelphia Electric Co., 521 F.2d 360 (3d Cir. 1975).

The Court of Appeals, Second Circuit, has emphasized that this rule was intended to avoid piecemeal adjudication and alleviate dangers of hardship and delay. Gumer v. Shearson, Hammill & Co., Inc., 516 F.2d 283, 286 (2d Cir. 1974); Campbell v. Westmoreland Farm, Inc., 403 F.2d 939, 941-42 (2d Cir. 1968).

There are three reasons for which certification at this time with appeal to follow would be advantageous to the next trial of these claims. First, and most important, as noted, it would significantly reduce the complexity of the evidence and simplify the task of the jury to keep separate the issues that have enough complexity

in themselves without mingling them with others of the most complicated kind. The main claim made by plaintiffs is for violation of a settlement agreement alleged to forbid defendants from making, using and selling medical tubing "incorporating features or configuration . . ." similar to that manufactured by plaintiffs under the agreement. This claim mushroomed during the trial into an issue as to whether different patents issued to plaintiffs and defendants for their respective tubing necessarily proved that the tubing was sufficiently different in features and configuration to be outside of the agreement. This, in turn, produced scientific demonstrations by both parties of such principles as the control of static electrical charges, hydrokinetics, and numerous hospital procedures and equipment used in the operating room. The dismissed counterclaims I, III and IV which dealt with violation of antitrust laws and unfair competition added a new and further dimension of difficulty to the evidence in the case. See Famous Foods, Inc. v. General Foods Corporation, 399 F. Supp. 705 (W.D. Pa. 1972).

On the other hand, should the dismissal of these counterc... be error, it would in all probability require a third trial since there is little foreseeable chance that these claims might be mooted by any developments in the retrial of the claims of plaintiffs and the one counterclaim of defendants allowed to stand. My rulings would be the law of the case for retrial if appellate review and decision does not intervene.

Secondly, while the legal issues of the claims and counterclaims are quite diverse, they all arise out of a common nucleus of facts, namely, defendant Sheridan's employment and work with plaintiffs, the settlement agreement, and his subsequent resignation and formation of a competitive company. Defendant Sheridan and his company National Catheter claim that plaintiffs have deliberately injured their business in this highly specialized medical supply field by attempting to monopolize the medical tubing market and at the same

time trying to prevent defendants from manufacturing their tubing which, although claimed to be different and superior to plaintiffs' in terms of the agreement, certainly competes with plaintiffs' products in the hospital supply market. Thus, if counterclaims I, III and IV are to be held ultimately legally meritorious, a large part of the evidence on these counterclaims would have to be repeated at yet a third and separate trial on the counterclaims. If the decision on the three counterclaims is allowed to remain dormant until the second trial on the amended complaint and counterclaim II, the final appeal would be very complicated by the appellate court having to review the two separate trial transcripts.

Lastly, the basis for the dismissal of the counterclaims by directed verdict, while due on the one hand to a lack of evidence showing any combination, conspiracy and intention to restrain trade and monopolize was also based in part on the legal principles of the Bradford decision which held that:

> no court applying the rule of reason has ever held [an employee restrictive covenant] violative of section 1 of the Sherman Act.
>
> Id., 501 F.2d 59 and 59 n.5.

This makes the issues involved in this certification largely questions of law, particularly, insofar as the defendants insisted that Compton v. Metal Products, Inc., 453 F.2d 38 (4th Cir. 1971), cert. den., 406 U.S. 968 (1972), should have controlled these issues rather than Bradford.

In conclusion, the defendants' motion under Federal Rule of Civil Procedure 54(b) is granted and the directed verdict with respect to counterclaims I, III and IV which dismissed these counterclaims is hereby expressly certified as a final judgment for purposes of appeal. There is, I find "no just reason for delay" under Federal Rule of Civil Procedure 54(b). See International Controls Corp., v. Vesco, _____F.2d_____, Slip Op. 3707 (2d Cir. May 13, 1976); Browning Debenture, Etc. v. Dasa Corp., 524 F.2d 811, 814 n.4 (2d Cir. 1975). The appeal on these counterclaims if affirmed will assure that the

case may again go to trial with less foreboding on the part of the trial judge that there are issues previously decided that might rise again, and if reversed will allow the entire action to be tried again as a unit with full appeal of all issues to follow. See Gas-a-Car, Inc. v. American Petrofina, Inc., 484 F.2d 1102 (10th Cir. 1973).

I believe sincerely that certification for appellate review at this time will benefit the litigants, the trial court and the Court of Appeals, Second Circuit. I hereby certify that there is no just reason for delay in the entry of final judgment as to counterclaims I, III and IV of the Amended Answer and Amended Counterclaim. I shall sign and file as of the date of this decision the order submitted by the defendants containing such statement and directing entry by the Clerk of final judgment dismissing these particular counterclaims.

Dated: July 22, 1976
Albany, New York

James T. Foley
UNITED STATES DISTRICT JUDGE

FILED

JUL 31 1973

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BRUNSWICK CORPORATION and SHERWOOD MEDICAL INDUSTRIES, INC., Plaintiffs,	)	
v.	)	No. 72 CV 522
DAVID S. SHERIDAN and NATIONAL CATHETER CORPORATION, Defendants.	)	

O R D E R

Upon consideration of defendant-counterclaimants' oral motion at the close of trial for a determination pursuant to Rule 54(b) to permit an immediate appeal from the granting of directed verdicts as to Counts I, III and IV of the counterclaim and upon consideration of the argument of counsel thereon, the court finding that:

A. The first trial ended with a hung jury as to the plaintiffs' claim and thus the court inevitably faces a second trial between the parties and the attendant delay in re-calendaring the case for trial.

B. The narrow legal issues raised by the judgments directing verdicts against Counts I, III, and IV of defendants' counterclaim have reached their full factual development and are ripe for review.

C. The interests of the sound administration of justice would best be served by seeking such appellate guidance as to the applicable law at this time--there being a substantial likelihood that such guidance would benefit all concerned by reducing the time and expense likely to be necessary for a final adjudication of the case.

It thus appearing that there is no just reason for delay in the entry of a final judgment as to Counts I, III and IV of this counterclaim, it is this 2nd day of June, at Albany, N.Y. 1976, hereby

ORDERED that the Clerk be, and hereby is, directed to enter a final judgment against the defendants-counterclaimants on Counts I, III, and IV of the Counterclaim.

James T. Foley
JUDGE